1 Dallas/Le Const 267. Bro Int Cas 509
1 Chitty Pl 49 - Newell, cont'd as one of the counts
Mr Jones - appl'n for new trial - no objection on
score of nature

Dec 5 Affirmed - Clifford.

SUPREME COURT OF THE UNITED STATES.

No. ~~274~~. 449. 37 24 12 ~~10~~ 9.

THOMAS H. NEWELL, PLFF. IN ER.,

vs.

RICHARD NIXON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

G. S. GIDEON, Printer, 511 Ninth street, Washington.

454

SUPREME COURT OF THE UNITED STATES.

No. 274.

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Circuit court of the United States, fifth circuit and eastern district of Louisiana.

RICHARD NIXON
vs.
THOMAS H. NEWELL. } No. 2,746.

Be it remembered, that heretofore, to wit, on the 20th April, 1857, came the defendant, Thomas H. Newell, by his attorneys, R. & H. Marr, in the clerk's office of said court, and filed a transcript of a record from the fifth district court of the city of New Orleans, which said transcript is in words and figures as follows, viz:

Transcript.

State of Louisiana, fifth district court of New Orleans.

Petition.—Filed 5th March, 1857.

RICHARD NIXON
vs.
THOMAS H. NEWELL. } No. 11,648.

To the honorable the judge of the 5th district court of New Orleans:

The petition of Richard Nixon, a resident of the city of New Orleans, respectfully represents: That Thomas H. Newell, a citizen of the State of Tennessee, is justly indebted to petitioner in the full sum of two thousand five hundred and eighty-seven 85-100 (2,585 85-100) dollars, with interest thereon from the 11 day of January, 1855, until paid, at the rate of 8 per cent. per annum: For this, viz., that on the said 11 day of January, 1855, Thomas H. Newell and Thomas Hamilton, since deceased, being co-owners of the steamboat "H. R. W. Hill," a boat engaged in carrying freight and passengers for hire, and in such capacity, viz., as owners, made and executed their note in favor of petitioner for the said sum of two thousand five hundred and eighty-seven dollars 85-100, with interest thereon at the rate of ten per cent. per annum, from the said 11 day of January, 1855, until paid, and payable one day after date; all of which will more fully appear by reference to said note hereto annexed, and made part of this petition, and said Thomas H. Newell and Thomas Hamilton were and are liable in solido for the payment of said note and obligation of said boat; that independently of this, said Thomas H. Newell is indebted to petitioner in the sum of two thousand five

hundred and eighty-seven 85-100 dollars, with interest from the 11 day of January, 1855, until paid, at a rate of 8 per cent. per annum: for this, viz., that petitioner, on or about the day of , 1854, shipped on said steamboat "H. R. W. Hill," a certain lot of freight, consisting of salt, which said freight was never delivered at its destination; that said salt was of the value of the said sum of two thousand five hundred and eighty-seven 85-100 , and that said note was given in consideration therefor; that said Thomas H. Newell permanently out of the State of Louisiana, and that petitioner is desirous that an attachment issue against any property of the defendant that may be found within the jurisdiction of this honorable court; and that for the payment of said indebtedness petitioner is entitled to a lien and privilege on the steamboat "H. R. W. Hill." Wherefore petitioner prays, that the bond and affidavit being considered, an order of attachment issue, commanding the sheriff of this to seize whatever property belonging to defendant that may be found within the jurisdiction of this honorable court; and after due proceedings had, that judgment be rendered in favor of petitioner and against said Thomas H. Newell for the full sum of two thousand five hundred and eighty-seven 85-100 dollars, together with interest thereon, at the rate of 8 per cent. per annum, from the 11 day of January, 1855, until paid, the whole to be paid by lien and privilege on the property attached, and that petitioner be declared to have a lien and privilege for the amount of said debt and interest, on the steamboat "H. R. W. Hill," for costs of suit and for general relief.

(Signed) J. THOS. WHEAT,
Att'y for Pl'ff.

Note.

NEW ORLEANS, 11 January, 1855.

$2,587 85-100.

One day after date, the steamer "H. R. W. Hill" and owners promises to pay to the order of Richard Nixon, twenty-five hundred and eighty-seven 85-100 dolls., value rec'd, with interest on same, at the rate of ten per cent. per annum, until paid.

(Signed) NEWELL & HAMILTON, *Owners.*

Affidavit.

Richard Nixon, the pl'ff in the foregoing petition, being sworn, says that the defendant, Thos. H. Newell, is justly indebted to him in the sum of two thousand five hundred and eighty-seven 85-100 dollars, with interest at the rate of 8 per cent. per annum, from the 11 day of January, 1855, until paid, and that said Newell resides permanently out of the State of Louisiana.

(Signed) RICHARD NIXON.

Sworn to and subscribed before me, March 5th, 1857.

C. M. BRADFORD, *J. P.*

Order.

Let a writ of attachment issue in this case as herein prayed for and according to law, on the pl'ff giving bond with good and solvent security in the sum of forty-five hundred dollars, conditioned as the law directs.

New Orleans, 5 March, 1857.

(Signed) D. AUGUSTIN, *Judge.*

Bond.

Know all men by these presents, that we, Richard Nixon and C. W. Phillips, of the city of New Orleans, and State of Louisiana, are held and firmly bound unto Thomas H. Newell in the sum of forty-five hundred dollars, lawful money of the United States of America, to be paid to said Thomas H. Newell's heirs, executors, administrators, and assigns, for which payment well and truly to be made we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the fifth day of March, in the year of our Lord, 1857: Whereas Richard Nixon has this day presented a petition to the Hon. the fourth district court of New Orleans praying an attachment:

Now, the condition of the above obligation is, that we, the above bound Richard Nixon and C. W. Phillips, will well and truly pay to the said Thomas H. Newell, the defendant in said attachment, all such damages as he may recover against us in case it should be decided that the attachment was wrongfully obtained.

(Signed) RICHARD NIXON, [L. S.]
(Signed) C. W. PHILLIPS. [L. S.]

Signed, sealed and delivered in the presence of—

Writ of attachment.

Fifth district court of New Orleans.

The State of Louisiana to the sheriff of the parish of Orleans, greeting:

Whereas due proof has been made before the fifth district court of New Orleans by Richard Nixon, that Thomas H. Newell is justly indebted to him in the sum of two thousand five hundred and eighty-seven 85-100 dollars, with 8 p. c. interest from 11 January, 1855, until paid, and that the said Thos. H. Newell resides permanently out of the State of Louisiana:

Now, therefore, you are commanded in the name of the State of Louisiana, and of the fifth district court of New Orleans, to seize and attach according to law, and take into your possession

the goods and chattels, lands and tenements, rights and moneys, effects and credits of the said Thomas H. Newell, if any you find in said parish, to the amount of what will suffice to discharge the said debt and costs of suit; and that you give notice of this proceeding by leaving a copy thereof at the last place of abode of the said defendant, if in said parish, and make a return of this writ, and endorse thereon the manner in which you have executed it before our court, according to law.

(Signed) G. LUMINAIS, *Dy. Clerk.*

Clerk's office, 5 day of March, 1857.

Sheriff's Return.—Recd. March 5th, 1857.

And on the same day, levied this writ on the steamboat "H. R. W. Hill," her engine, machinery and furniture, and posted copy of this writ to the door of the church of St. Louis, parish of Orleans, and to that of the room in which this honorable court holds its sittings, and on the same day released the said seizure, Thomas H. Newell having executed bond in the sum of four thousand dollars, with Robert Dyas as security, conditioned as the law directs. Writ and bond returned same day.

(Signed) H. H. WILSON, *Dy. Shff.*

Bond annexed to Writ.

Know all men, that we, Thomas H. Newell as principal, and Robert Dyas as security, are held unto John M. Bell, sheriff of the parish of Orleans, in the State of Louisiana, in the penal sum of four thousand dollars, ($4,000,) for the payment whereof to the said John M. Bell, sheriff, his executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators, respectively by these presents, as witness our respective names hereunto affixed, at New Orleans, this 5 day of Mch., in the year one thousand eight hundred and fifty-seven.

Whereas, in and by virtue of a writ of attachment issued out of the hon. the 5th district court of New Orleans, at the suit of Richard Nixon vs. Thomas H. Newell, and numbered 11,648 on the docket of the said court, and which suit is now pending therein, the following described property, to wit, the steamboat "H. R. W. Hill," her engine, machinery and furniture, has been seized, taken into the custody of the said sheriff, and detained according to law; but the same has been released and the attachment thereon set aside, upon the appearance of the defendant in the said suit and delivering to the said John M. Bell, sheriff, the present obligation.

The condition of which is such, that if the said defendant shall satisfy such judgment as may be rendered against him in the suit

pending as above mentioned, then this obligation to be void, or else to remain in full force.

(Signed) T. H. NEWELL,
(Signed) ROBT. DYAS.

Signed and delivered in the presence of—
SAML. POWERZ, *Dy. Sheriff*.

Endorsement on Bond.

I do hereby assign, transfer, and set over to plaintiff, Richard Nixon, all my right, title, and interest in and to the within bond and obligation.

New Orleans, March 5th, 1857.

(Signed) W. H. WILSON, *Dy. Sheriff*.

Citation.

State of Louisiana, fifth district court of New Orleans.

Mr. Thomas H. Newell, residing permanently out of the State of Louisiana:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court of New Orleans, in the city of New Orleans, in ten days after the service hereof.

Witness the honorable D. Augustin, judge of the said court, the 5th day of March, in the year of our Lord 1857.

(Signed) G. LUMINAIS, *Dy. Clerk*.

Sheriff's Return.—Recd. March 5th, 1857.

RICHARD NIXON
vs.
THOS. H. NEWELL. } No. 11,648.

On the same day I posted a copy of the within citation to the door of the church of St. Louis, of the parish of Orleans, in the city of New Orleans, and to that of the room in which this Hon. court holds its sittings.

Returned same day.

(Signed) ERNEST DAVIS, *Dy. Sheriff*.

Petition to remove cause into circuit court of U. S.—Filed 16th March, 1857.

To the Hon. judge of the fifth district court of New Orleans.

The petition of Thomas H. Newell, a citizen of the State of Tennessee, respectfully represents unto your honor, that Richard Nixon, a citizen of the State of Louisiana, residing in the city of

New Orleans hath commenced suit against your petitioner in this honorable court, for the recovery of the sum of two thousand five hundred and eighty-seven dollars and eighty-five cents, with interest at the rate of 8 p. c. per annum from the 11 day of January, 1855, and costs of suit, all of which appears by reference to the petition filed in this honorable court by the said Nixon, and numbered on the docket 11,648; that your petitioner desires to have the said cause heard and determined in the federal tribunals, and to that end he is ready and willing, and hereby offers now to give bond, with Richard J. Dyas as his security, in the penal sum of one thousand dollars, which he prays the court to accept as sufficient surety, conditioned according to the laws of the United States of America, in such cases made and provided.

Wherefore, petitioner prays your honor to order that the said cause be removed for trial into the circuit court of the United States, fifth circuit, holding sessions at the city of New Orleans, in and for the eastern district of Louisiana, at the next ensuing April term of said court, and that the clerk of this court furnish petitioner the necessary copies to be filed in said circuit court.

And as in duty, &c.

(Signed) R. & H. MARR,
Att'ys for T. H. Newell.

Bond.

Know all men by these presents, that we, Thomas H. Newell, of the State of Tennessee, and Richard J. Dyas, of the city of New Orleans, are held and firmly bound unto Richard Nixon, of the city of New Orleans, in the sum of one thousand dollars, to be paid to the said Nixon, his heirs, executors, administrators, and assigns, for which payment well and truly to be made, we bind ourselves, and each of us by himself and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the 16 day of March, in the year of our Lord 1857.

Whereas the said Thomas H. Newell hath this day filed and presented to the Hon. judge of the 5th district court of New Orleans, a petition praying for the removal of a suit commenced in said court by Richard Nixon, a citizen of the State of Louisiana, against Thomas H. Newell, a citizen of the State of Tennessee, being number 11,648 of the docket, into the circuit court of the United States, fifth circuit, holding sessions at the city of New Orleans, in and for the eastern district of Louisiana, at the next ensuing April term of said circuit court:

Now, the condition of the above obligation is such, that if the said Thomas H. Newell shall enter and file in the said circuit court, on the first day of its next ensuing April term, copies of all the proceedings and process against him in the said suit of Rich-

ard Nixon, and shall appear in the said court on the said first day of the next ensuing April term of said court, and then and there except, or plead or demur or answer to the petition of the said Richard Nixon, and shall otherwise comply with the requirements of the laws of the United States in such cases made and provided, then the foregoing obligation shall be null and void, otherwise it shall be and remain in full force and virtue, as well against the said Thomas H. Newell as against Richard J. Dyas, security.

(Signed) THOS. H. NEWELL, his [SEAL.]
By R. H. MARR, *Att'y.*
(Signed) RICHARD J. DYAS. [SEAL.]

In presence of—
(Signed) R. H. MARR.

Rule and Grounds.—Filed 24th March, 1857.

Fifth district court of New Orleans.

R. NIXON
vs. } No. 11,648.
T. H. NEWELL.

On motion of R. & H. Marr, of counsel for Thomas H. Newell, and appearing herein solely for the purposes of this motion, without prejudice to any right of their said client, Thomas H. Newell, the said counsel, being required by the honorable judge of this court to proceed by way of rule to show cause why this cause should not be removed into the circuit court of the United States, as prayed for in the petition of Thomas H. Newell, it is now ordered by the court, that Richard Nixon, plaintiff, show cause, if any he hath or can, on Saturday next, the 28 day of March, 1857, at 10 o'clock a. m., why this cause should not be removed into the circuit court of the United States, fifth circuit, holding sessions at the city of New Orleans, in and for the eastern district of Louisiana, at the next April term of said court, upon the ground that the said Thomas H. Newell did, on the 16 day of March, 1857, file in this Hon. court his petition for the removal of said cause into the said circuit court, accompanied with bond and security, in accordance with the laws of the United States of America in such cases made and provided, the said petition setting forth fully and in detail the grounds of the said removal; and that Richard Nixon or J. T. Wheat, Esq., his attorney of record, have due notice of this motion.

Order rule continued.—28th March, 1857.

RICHARD NIXON
vs. } No. 11,648.
THOS. H. NEWELL.

By consent of counsel, it is ordered that the rule herein taken

on the 24th inst. by the defendant on the plaintiff to transfer this cause to the circuit court of the United States for the eastern district of Louisiana, and fixed for this day, be continued until Saturday next, the 4th April, at 10 o'clock a. m.

Order rule renewed.—13th April, 1857.

RICHARD NIXON
vs.
THOMAS H. NEWELL. } No. 11,648.

On motion of R. & H. Marr, att'ys for T. H. Newell, it is ordered that the rule herein taken by said Newell on the plaintiff, on 24th ultimo, to transfer this cause to the circuit court of the U. S., be renewed and fixed for Saturday next, the 18th instant, at 10 o'clock a. m.

Rule renewed.—13th April, 1857.

RICHARD NIXON
vs.
THOMAS H. NEWELL. } No. 11,648.

On motion of R. & H. Marr, of counsel for Thomas H. Newell, and appearing herein solely for the purpose of this motion, without prejudice to any right of their said client, Thomas H. Newell, the said counsel, being required by the honorable judge of this court to proceed by way of rule to show cause why this cause should not be removed into the circuit court of the United States, as prayed for in the petition of Thos. H. Newell, it is now ordered by the court, that Richard Nixon, plaintiff, show cause, if any he hath or can, on Saturday next, the 18th day of April, 1857, at 10 o'clock a. m., why this cause should not be removed into the circuit court of the United States, fifth circuit, holding sessions at the city of New Orleans, in and for the eastern district of Louisiana, at the next April term of said court, upon the ground that the said Thomas H. Newell did, on the 16 day of March, 1857, file in this Hon. court and present to the judge of this honorable court his petition for the removal of said cause into the said circuit court, accompanied with bond and security, in accordance with the laws of the United States of America in such cases made and provided, the said petition setting forth fully and in detail the grounds of the said removal; and that Richard Nixon or J. T. Wheat, Esq., his attorney of record, have due notice of this motion.

Sheriff's Return.

Rec'd April 14th, 1857, and on the 15th served copy of within rule on J. T. Wheat, attorney for plaintiff, herein personally. Returned same day.

(Signed) C. GERRETS, *D'y Sheriff.*

Order rule absolute.—18th April, 1857.

RICHARD NIXON
vs.
THOMAS H. NEWELL. } No. 11,648.

The rule herein taken on the 24th March ultimo, by defendant on the plaintiff herein, to show cause why this cause should not be removed into the circuit court of the United States, fifth circuit, holding sessions at the city of New Orleans, in and for the eastern district of Louisiana, at the next April term of said court, came on this day for hearing before the court.

R. & H. MARR, *for Defdt.*
J. T. WHEAT, *for Plff.*

When, by consent of plff's attorney, it is ordered that said rule be made absolute with costs.

I hereby certify that the above and foregoing 18 pages do contain a transcript of all the proceedings as well as of all the documents filed, and all the testimony adduced on the trial of the cause, wherein Richard Nixon is plaintiff and Thomas H. Newell is defendant, instituted in this court, and now on the records thereof, under the No. 11,648.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this twentieth day of April, in the year of our Lord one [SEAL.] thousand eight hundred and fifty-seven, and in the eighty-first year of the independence of the United States of America.

G. LUMINAIS,
D'y Clerk.

Proceedings in circuit court.

Plea, exception, and answer.—Filed April 27th, 1857.

U. S. circuit court at New Orleans.

RICHARD NIXON
vs.
THOMAS H. NEWELL. }

Now comes Thomas H. Newell, defendant in the above entitled cause, and for plea to the writ of attachment, in virtue of which the steamboat "H. R. W. Hill" has been seized in said cause, he pleads that the said steamboat "H. R. W. Hill" is not now, and was not at the time the said writ issued and was levied, the property of this defendant, and that the said steamboat was at that time and is now the property of the association, composed of divers persons, called the "Memphis and New Orleans Steam-

packet Company," in which defendant is one of the stockholders, and that the said boat is not now and was not at the time of the issuing and levying of the said attachment, subject to the individual debts of defendant, nor liable to seizure at the suit of his individual creditors; wherefore, he prays judgment of the said writ, and that the same be dissolved with costs.

And for exception and plea to the said action on the merits, defendant, reserving the benefit of his foregoing plea to the said writ, shows: That the cause of action is not set forth in the plaintiff's petition with such distinctness and precision as the law recognizes and as are necessary, in order that defendant may make his defence properly; wherefore, he prays judgment of the said petition, and that the same be so amended as to set forth fully and distinctly the date of the shipment, the quantity of salt shipped, by whom, and where it was shipped, to whom, and where it was consigned and to be delivered, and fully the breach of the contract of affreightment complained of, or that the said petition be dismissed with costs; but should this exception be overruled, then and not otherwise defendant pleads a general denial.

And for further answer, he shows: That he never was at any time a member of any firm or partnership, known as "Newell & Hamilton," or doing business under the name and style of "Newell & Hamilton;" and he avers that no person whomsoever had ever at any time power or authority to bind him by note or other contract, or otherwise, under the said name and style of "Newell & Hamilton."

Respondent further shows: That the said pretended cause of action accrued more than one year previous to the bringing of suit, as is shown by the said petition; and respondent pleads in bar of said action the prescription of one year, established by the code of Louisiana, art. 3,501.

And respondent further shows, that on or about the 10 day of December, 1856, he paid to Richard Nixon the sum of two thousand four hundred and fifteen dollars and four cents, ($2,415 04-100,) for which said Nixon gave a receipt in full of his account against steamboat "H. R. W. Hill," which said payment respondent made, supposing himself to be indebted in that amount; whereas, in truth and in fact, Richard Nixon was indebted to respondent in the sum of $2,383 80-100, which was not taken into the account, and should have been deducted from the said sum of $2,415 04-100.

And respondent reserves to himself the right to sue by separate action for the recovery of said sum so paid by him erroneously, and also the right of further pleading such matters of defence as he must be advised are material, whenever the said petition shall be so amended as to set forth fully the cause of action relied on.

Respondent avers that he is in no manner bound by the instrument sued on, purporting to be a promissory note signed "Newell

& Hamilton," and that he is on no account liable for any part of the contents thereof; that the signature is not his, and was not made by his consent or authority.

Respondent admits that he and Thomas Hamilton were the owners of the steamboat "H. R. W. Hill" in 1854, and in January, 1855; but denies that any partnership existed between them other than such as may result by law from such ownership, and he also states that he believes the note sued on to be in the handwriting of said Thomas Hamilton, but he emphatically, and again denies the authority of said Hamilton to bind him by note or other similar contract.

Wherefore, he prays that plaintiff's demand be rejected, with costs, and for general relief, &c.

R. & H. MARR, *Attorneys.*

Supplemental petition.—Filed May 2nd, 1857.

To the hon. the judges of the United States circuit court for the fifth circuit and eastern district of La.

The supplemental petition of Richard Nixon, respectfully represents:

That during the month of June, in the year 1854, petitioner shipped on board the stmr. "H. R. W. Hill," whereof Thomas H. Newell was an owner, a certain lot of freight, consisting of 4,716 sacks of salt; that said salt was so shipped, to be transported to the city of Nashville, Tennessee, consigned and to be delivered to Messrs. W. H. Gordon & Co., at said city of Nashville, for 75 cts. per sack freight; that the whole of said shipment of 4,716 sacks of salt was not delivered as consigned, but that only two thousand three hundred and ten sacks thereof were delivered, leaving a deficit in said shipment of two thousand four hundred and six sacks, in consideration of which said deficit and non-delivery of 2,406 sacks, petitioner was entitled to its value, and received therefor the note of said Thomas H. Newell and Thomas Hamilton, now deceased, owners of said steamer "H. R. W. Hill," for the sum of two thousand five hundred and eighty-seven 85-100, 2,587 85-100 dollars.

Wherefore, petitioner renews the prayer of his former petition, as also that for general relief.

J. THOS. WHEAT,
Atty. for Plff.

Answer to supplemental petition.—Filed 16th May, 1857.

U. S. circuit court at New Orleans.

RICHARD NIXON
vs.
THOMAS H. NEWELL. } No. 2,746.

Now comes Thomas H. Newell, defendant in the above entitled

cause, and reserving all the benefits of the pleas, exceptions, and answer, by him heretofore filed to the original petition, for answer to the supplemental petition of Richard Nixon in said cause filed, he pleads a general denial, and calls for full proof of every allegation in the petition contained, tending in any manner to charge him, or to make him liable to the demand of said Nixon.

Respondent specially denies the shipment, consignment and breach in the petition alledged. He also specially denies the existence of any such firm as "Newell & Hamilton." He avers that he did not execute or deliver the note sued on, and charges, and so the truth is, that the said note, by whomsover made and delivered, was so executed without his authority, or knowledge, or consent, and he calls for full proof of every fact touching the consideration, execution, and delivery of said note requisite to charge him for the contents thereof. Respondent avers that the pretended cause of action is alledged in the petition to have occured more than one year previous to the bringing of this suit, and that the same is barred by the prescription of one year, and that more than one year elapsed after the date of the note sued on, before suit was brought; that if the said note can have any effect whatever against respondent, which he denies, it could only amount to an acknowledgement of indebtedness, which is subject to the same prescription as the debt acknowledgement. And respondent here specially pleads the prescription of one year against the said demand.

Wherefore, respondent prays that the plaintiff's demand be rejected with costs, and for general relief, &c.

R. & H. MARR, *Attys. for Newell.*

Submission of cause.—April term, 1859.

NEW ORLEANS, Monday, 2d May, 1859.

Court met pursuant to adjournment: Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

RICHARD NIXON
vs. } 2,746.
THOMAS H. NEWELL.

This cause was argued by Messrs. Wheat & Duncan for plff., and by R. H. Marr, Esq., for defendant, and submitted to the court.

Opinion of the court.—Filed 5th of May, 1859.

Circuit court of the United States, eastern district of Louisiana.

RICHARD NIXON
vs
THOMAS H. NEWELL.

This suit was commenced by attachment of the estate of the de-

fendant, in the 5th district court of New Orleans. It was shortly after removed by the defendant to this court, under the 12th section of the judiciary act of 24 September, 1787. The property attached prior to this was returned to the defendant, upon his bond to answer the debt of the plaintiff. These facts preclude the defendant from denying the jurisdiction of the court over his person, because he had no title to that property; his exception is overruled.

The plaintiff produces the note, described in and annexed to his petition, which is signed "Newell & Hamilton" owners," and acknowledges a debt from the owner of the "H. R. W. Hill," a steamboat, of which the defendant owned three-fourths and Thomas Hamilton one-fourth. This note was executed by Thomas Hamilton, and it is in proof that its existence was known to the defendant prior to the death of Hamilton in August, 1855. The evidence establishes that there was no commercial partnership between the defendant and Hamilton, and that they did not transact the business of the boat under a social name, and were not accustomed to sign notes or bills in this form. They were simply part owners in that boat, and both resided in Tennessee. Under these circumstances, the note is not obligatory upon the defendant unless he is connected with it by additional testimony.—Story on Part., § 453.

The additional evidence submitted, consists in proof that the plaintiff shipped four thousand seven hundred and sixteen sacks of salt in the year 1854, on the boat "H. R. W. Hill" for Nashville. The witness, Gordon, testifies that in July, 1854, he received of this shipment 2,310 bags, which were sold for the account of the plaintiff on arrival, by a lighter from the "H. R. W. Hill," then lying at Paducah; that in January, 1855, he received 2,188 sacks, that had been stored at Paducah. This arrived in very bad condition, and was taken by the agent of the owners of the "Hill," who disposed of the same for their account. This witness proves that both the plaintiff and Newell admitted the shipment to have been 21,716 sacks, and that Nashville was the destination.

The witness, Hamilton, proves that he received the 2,188 sacks of salt for account of the "Hill," and that a portion of the same shipment was sold at Paducah; that he received it as the agent of the boat, the plaintiff having refused to receive it on account of its bad condition, and that he sold it with the consent of both the owners. He knows that the note sued on was given; that the consideration was the balance due by the steamboat and owners for the salt not delivered to the plaintiff. He also testifies that the defendant was aware of the making of the note and the consideration for which it was given. There is no evidence that the defendant dissented from the act, or that he ever made any objection to the claim of the plaintiff. But the evidence extends further: after the death of Hamilton, his administrator made a

settlement with the defendant, and transferred to him the one-fourth interest in the boat that belonged to his intestate, and all the property that belonged to the owners as such. For this the defendant assumed to pay all (save three) of the debts and liabilities of the boat. The term "boat," in this contract, must be construed to mean, those binding the owners on account of their interest in the boat. This assumption was made for an adequate consideration. The note on the face of it expresses an obligation affecting the boat, and the evidence is satisfactory to establish, that it was given in recognition of such a liability.

It is settled, that in cases of simple contract, if one person make a promise for the benefit of a third, although no consideration move from the latter, it is binding, and that either of the parties may maintain a suit upon it. This is a general principle in the law of contracts.—Story on Cont., § 2 Hennen's Dig., 1,086.

We think that the defendant cannot resist the payment of this debt on the ground that he was not a party to the settlement, and did not authorize the signature of his name to the note.

The proof shows that the debt on which the payment of the defendant to the plaintiff were made, referred to an agency account on the part of the plaintiff for the owners of the boat and concerning its business. The witness who made the payments testifies that this claim did not form any part of the account. The payments, therefore, cannot be referred to it.

We do not consider the production of the bill of lading to be essential to the support of this action. The suit is not brought on the contract of the shipment, but to collect the sum acknowledged to be due in consequence of the breach of the contract.

Upon the whole evidence our opinion is, the plaintiff is entitled to recover the amount of the note and eight per cent. interest.

J. A. CAMPBELL,
Ass. Just. Sup. C. U. S.

Judgment.—April term, 1859.

New Orleans, Thursday, 5th May, 1859.

Court met pursuant to adjournment. Present, Hon. J. A, Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

Richard Nixon
vs. } 2,746.
Thos. H. Newell.

This cause having been argued and submitted on a former day, and the court having considered the same, this day delivered its opinion in writing and in conformity thereto, doth now order, adjudge, and decree that the plff., Richard Nixon, do have and recover judgment against the defendant, Thomas H. Newell, for

the sum of twenty-five hundred and eighty-seven dollars and eighty-five cents, with interest thereon at the rate of eight per cent. per annum from 11th January, 1855, until paid, and costs of suit, with privilege upon the steamer "H. R. W. Hill."

Motion for new trial.—April term, 1859.

NEW ORLEANS, Friday, 6th May, 1859.

Court met pursuant to adjournment. President, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

RICHARD NIXON
vs.
THOS. H. NEWELL. } 2,746.

On motion of R. H. Marr, Esq., of counsel for defendant, it is ordered that plaintiff show cause on Wednesday next, the 11th May, 1859, at 10 o'clock a. m., why the judgment herein rendered should not be set aside, and a new trial granted for the grounds on file.

Grounds for trial.—Filed 6 May, 1859.

U. S. circuit court at New Orleans, fifth circuit, eastern district of La.

RICHARD NIXON
vs.
THOMAS H. NEWELL. } No. 2,746.

First. Because the judgment is contrary to the law.

Second. Because the court erroneously allowed eight per cent. interest on the amount sued.

Third. Because the judgment is contrary to the evidence.

Fourth. Because the court erroneously admitted the depositions of Andrew Hamilton and William H. Gordon, notwithstanding the objections of the defendant's counsel.

Fifth. Because the court erred in point of fact in supposing that it had been proven that the defendant, Newell, was aware of the existence of the note sued on before the death of Thomas Hamilton, which is proven to have occurred in August, 1855, and not in August, 1856.

Sixth. Because the court erred in point of fact in supposing that Newell had admitted to the witness, William H. Gordon, that the shipment consisted of 4,716 sacks of salt.

Seventh. Because there is no proof of any acknowledgment by Newell of the specific debt sued for, which alone could defeat defendant's plea of prescription.

Eighth. Because plaintiff neither alledged nor proved that the salt in question was his property.

And that plff. or J. T. Wheat, esq., his attorney of record, have due notice of this motion.

Submission on motion for new trial.—April term, 1859.

NEW ORLEANS, Wednesday, 11th May, 1859.

Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

RICHARD NIXON
vs. } 2,746.
THOS. H. NEWELL.

The application herein made by the defendant for a new trial came on to be heard, and was argued by Mr. Marr for said defendant, and submitted to the court.

Order refusing new trial.—April term, 1859.

NEW ORLEANS, Thursday, 12th May, 1859.

Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge; present, Theo. H. McCaleb, district judge.

RICHARD NIXON
vs. } 2,746.
THOMAS H. NEWELL.

The court having considered the application herein made on part of the defendant for a new trial, doth now order that the said application be refused.

Defendant's bill of exceptions.—Filed 13th May, 1859.

Circuit court of the United States, eastern district of Louisiana.

RICHARD NIXON
vs. } No. 2,746.
THOMAS H. NEWELL.

Be it remembered that on the trial of this cause, the same was submitted to the court without a jury. The defendant offered to prove his exception, that he had no interest in the boat "H. R. W. Hill," at the date of the levy upon the same in the fifth district court of New Orleans, and offered competent evidence, consisting of the enrollment and bill of sale, to show that it was then the property of other parties. But the court, referring to the replevy bond of the defendant, withdrawing the boat from the levy, and the appearance of the party and the removal of the cause, overruled the said evidence and the exception, and to this the defend-

ant excepted. And the court found from the evidence produced by the defendant, that the steamboat "H. R. W. Hill," was commanded by him, and he owned three-fourth parts of her, and Thomas Hamilton owned the remaining one-fourth, in the year 1854 and 1855; that they were not partners, and had no social name for transacting the business of the boat, and were not accustomed to sign notes or bills for each other, but that each signed for himself whenever it was necessary to give securities concerning the business of the boat, and that the note attached to the petition of the plaintiff was not in the handwriting of the defendant, but of Hamilton. His evidence also proved that Thomas Hamilton died in August, 1855; that on the 1st July, 1856, plaintiff rendered to defendant an account against the steamboat "H. R. W. Hill," upon which he and defendant settled; that defendant then paid plaintiff some four thousand dollars on that account, leaving a balance due plaintiff of two thousand three hundred and seven dollars and fifty-two cents; that on the 11 September, 1856, plff. again rendered an account to defendant against the steamboat "H. R. W. Hill," for $2,307 52, balance remaining unpaid on the account rendered 1st July, 1856; that on the 10 of December, 1856, defendant gave plaintiff a draft at 60 days for $2,415 04, being for the balance of $2,307 52, as shown by the account rendered 11 September, 1856, and interest to the maturity of the draft; that this draft was paid at maturity, and that on the 10 December, 1856, the date of the drawing and delivery of said draft, plaintiff gave defendant a receipt for $2,415 04 in full of account of steamboat "H. R. W. Hill." These receipts are filed and make part of this statement. It was also proven that the several accounts rendered to defendant by plaintiff, related exclusively to the agency of plaintiff for the owners of the boat, and that the claim sued upon was not included in the accounts rendered, and was not mentioned at the time the settlement was made, nor at the time the several payments were made.

And the court received the two depositions on file which were taken on behalf of plaintiff without passing upon the exceptions, but subject thereto, and used the said depositions to find, that the plaintiff was the shipper of 4,716 sacks of salt on the "H. R. W. Hill," in the summer of 1854, and consigned to Nashville, in Tennessee; that only 2,300 sacks were delivered in the summer at Nashville; that the note attached to the petition was given by Thomas Hamilton, a part owner of the "H. R. W. Hill," in liquidation of the demand of plaintiff, and that the defendant had notice of it, either near the time or before the settlement with the administrators of Thomas Hamilton, in which the latter transferred to the defendant the one-fourth interest of his intestate in the boat, and all the assets belonging to the owners as such, and when the defendant assumed all the debts due by the boat, "H. R. W. Hill," which settlement and transfer took place on the 22

September, 1856, and that the obligation sued upon was included in said assumption in the terms "all the debts due by the boat." The conclusion of the court was, that the defendant had notice of the giving of the note before the death of Thomas Hamilton, but there was no proof that it had ever been exhibited to defendant, or payment demanded of him, before the bringing of this suit. And the defendant by his counsel objected that the note was not binding upon him, because he did not make it, and no evidence of an authorization or recognition of him was shown. And that no recovery could be had upon the consideration stated in the petition, because the bill of lading was not produced, and because the allegations of the petition were not supported by the evidence, but that the evidence varied from them in that, Andrew Hamilton, in his deposition, one of the two taken in behalf of plaintiff and on file in the cause, proves that the salt in question was consigned to plaintiff, and no other witness proves to whom it was consigned, because there was not competent evidence of the shipment, nor sufficient proof of the ownership of the salt; that the evidence contained in the two depositions failed to support the claim in the petition, either upon the note or the consideration on which it was given, and that the said claim was barred by the prescription established by article 3,501 of the civil code of Louisiana. But the court, for the reason explained in their written opinion, supported the demand of the plaintiff, and certifies this case under their hands and seals in order that the defendant may review their judgment.

New Orleans, 12 May, 1859.

J. A. CAMPBELL, [SEAL.]
Presiding Judge.
THEO. H. McCALEB, [SEAL.]
U. S. Judge.

Document "A," annexed to defendant's bill of exceptions.

Steamer H. R. W. Hill

To Richard Nixon, Dr.

July 1st—To balance acc. ren'd - - - - $2,307 52

Nashville, 11th Sept., 1856.

Document "B," annexed to defendant's bill of exceptions.

Rec'd, New Orleans, 10 December, 1856, from Mess. Dyas & Co., their acceptance of T. H. Newell's draft for twenty-four hundred and fifteen 04 dollars, at 60 da., in full of account St. Bt. "H. R. W. Hill."

$2,415 04. RICHARD NIXON.

Draft annexed to defendant's bill of exceptions.

NEW ORLEANS, Dec. 10th, 1856.

$2,415 04-100.

Sixty days after date pay to the order of Richard Nixon, twenty-

four hundred and fifteen 04-100 dollars, for value rec'd, and charge to account.

Your obt. servant,

T. H. NEWELL.

To Dyas & Co., New Orleans, La. Paid.

Endorsed: Richard Nixon, pay the bank of New Orleans.

C. W. PHILLIPS & CO.

Final judgment.

Circuit court of the United States, fifth circuit and eastern district of Louisiana, April term, 1859.

New Orleans, Thursday, 5th May, 1859.

Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

Richard Nixon
vs. } 2,746.
Thomas H. Newell.

This cause having been argued and submitted on a former day, and the court having considered the same this day, delivered its opinion in writing, and in conformity thereto doth now order, adjudge, and decree that the plaintiff, Richard Nixon, do have and recover judgment against the defendant, Thomas H. Newell, for the sum of twenty-five hundred and eighty-seven dollars and eighty-five cents, with interest thereon at the rate of eight per cent. per annum, from 11 January, 1855, until paid, and costs of suit, with privilege upon the steamer "H. R. W. Hill."

Judgment rendered 5th May, 1859.

Judgment signed 13th May, 1859.

J. A. CAMPBELL,
Presiding Judge.

Petition for writ of error.—Filed 13 May, 1859.

To the hon. judges of the circuit court of the United States, fifth circuit, holding sessions at the city of New Orleans, in and for the eastern district of Louisiana:

The petition of Thomas H. Newell, a citizen of the State of Tennessee, respectfully shows unto your honors: That at the present April term of this hon. court, a certain final judgment has been rendered against your petitioner in favor of the plaintiff in a certain suit at law lately pending in said court, in which Richard Nixon was pl'ff and your petitioner was defendant, for a sum exceeding two thousand five hundred dollars, as appears by reference to the record and proceedings in said cause, being No.

2,746 of the docket; and that your petitioner is advised that there is error in the said final judgment to his prejudice, whereby he is aggrieved.

Wherefore, petitioner prays that a writ of error, to operate as a supersedeas and stay of execution, be granted him from said final judgment, returnable in the Supreme Court of the United States, at the next ensuing December term thereof, to be held at the city of Washington, on the first Monday of December, 1859, on defendant giving bond with good and sufficient security, in a sum to be fixed by the court, in favor of said Richard Nixon, plaintiff, conditioned according to law; and that said Richard Nixon be duly cited to appear and answer the same. And as in duty, &c.

R. H. MARR, *for Newell.*

Order allowing writ of error.—April term, 1859.

NEW ORLEANS, Friday, 13 May, 1859.

Court met pursuant to adjournment. Present, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

RICHARD NIXON vs. THOMAS H. NEWELL. } 2,746.

On motion of R. H. Marr, Esq., of counsel for defendant, and on presenting and filing a petition praying for a writ of error from the judgment herein to the next term of the Supreme Court of the United States, it is ordered that the writ be allowed as prayed for, the same to operate as a supersedeas, upon the said defendant furnishing bond in the penal sum of seven thousand dollars, conditioned according to law, with good and solvent surety thereon.

Bond for writ of error.—Filed 13 May, 1859.

Know all men by these presents, that we, Thomas H. Newell, as principal, and Robert Dyas, as *sureties*, are held and firmly bound unto Richard Nixon in the full and just sum of seven thousand dollars, to be paid to the said Richard Nixon, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 13th day of May, in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, at the city of New Orleans, in a suit depending in said circuit court, wherein said Richard Nixon was plaintiff and said

Thomas H. Newell was defendant, judgment was rendered against the said Thomas H. Newell, and the said Thomas H. Newell having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard Nixon, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Thomas H. Newell shall prosecute said writ to effect, and satisfy such judgment as said Supreme Court may give, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

THOMAS H. NEWELL, [L. S.]
By R. H. MARR, *Att'y.*
ROB. DYAS. [L. S.]

Sealed and delivered in presence of—
JAMES A. LUSK.

Approved: THEO. H. McCALEB,
U. S. Judge.

Circuit court of the United States, 5th circuit and eastern district of Louisiana.

CLERK'S OFFICE:

I certify that the foregoing fifty-three pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of Richard Nixon vs. Thomas H. Newell, No. 2,746 of the docket of the said court.

Witness my hand and the seal of the said court, at New
[SEAL.] Orleans, this 26th day of August, 1859.

J. W. GURLEY, *Clerk.*

United States of America, ss.

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or one of you, between Richard Nixon and Thomas H. Newell, a manifest error hath happened, to the great damage of the said Thomas H. Newell, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this thirteenth [SEAL.] of May, in the year of our Lord one thousand eight hundred and fifty-nine.

J. W. GURLEY,
Clerk of the United States Circuit Court for Eastern District of Louisiana.

The United States of America.

The President of the United States to Richard Nixon, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Thomas H. Newell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this thirteenth day of May, in the year of our Lord one thousand eight hundred and fifty-nine.

J. A. CAMPBELL,
Associate Justice of the Supreme Court of the U. S.

Marshal's return.

Rece'd May 14, '59, and on the same day served copy of the within citation in error on Richard Nixion, by handing the same to James W. Duncan, Esqre., attorney of record for said Richard Nixon, being absent at the time from New Orleans; and on the same day I returned this writ into court.

CHAS. CATOIR, *D'y M.*

Service of this writ accepted in behalf of the defendant in error, Richard Nixon.

DUNCAN & WHEAT,
For Defendant in Error.

May 17th, 1859.

877

Supreme Court of the United States.

THOMAS H. NEWELL, PLAINTIFF IN ERROR,

vs.

RICHARD NIXON.

BRIEF FOR DEFENDANT IN ERROR.

McGILL & WITHEROW, Printers and Stereotypers, 366 E Street.

Supreme Court of the United States.

THOMAS H. NEWELL, PLAINTIFF IN ERROR,

vs.

RICHARD NIXON.

BRIEF FOR DEFENDANT IN ERROR.

Nixon, a resident of New Orleans, instituted this suit in one of the State courts at New Orleans, against the defendant, a resident of Tennessee, and gave jurisdiction to the court against the defendant by attaching as his property the steamboat "H. R. W. Hill," then in the port of New Orleans. On the same day, the defendant, who was at New Orleans, bonded the boat, (4.) Soon afterwards, he prayed for the removal of this case to the circuit court of the United States, at New Orleans, under the 12th section of the judiciary act, of September 24, 1789, he being a citizen of another State, and this was ordered accordingly, (9.)

The petition (1) and supplemental petition (11) allege that the plaintiff shipped, in June, 1854, at New Orleans, by the steamboat "H. R. W. Hill," whereof the defendant, Thomas H. Newell, and one Thomas Hamilton, were the owners, to W. H. Gordon & Co., of Nashville, 4,716 sacks of salt, of which 2,506 sacks never were delivered; that the value of this salt was $2,587 85; and that in settlement of the claim which the plaintiff then had against the owners of a boat, they gave him the note sued on; which is in the following words, (2):

"NEW ORLEANS, 11th *January*, 1855.

"$2,587 85.

"One day after date, the steamer "H. R. W. Hill," and owners, promise to pay to the order of Richard Nixon twenty-five hundred and eighty-seven 85-100 dollars, value received, with interest on same at the rate of ten per cent. per annum, until paid.

(Signed) "NEWELL & HAMILTON, *Owners.*"

The plaintiff then prayed for judgment for $2,587 85, with *eight* per cent. interest from the maturity of the note, and lien on the steamboat "H. R. W. Hill."

The defendant's answer (9) admits that, in 1854, and in January, 1855, he and Thomas Hamilton were the owners of the steamboat "H. R. W. Hill;" but alleges that when she was attached, in 1857, she was the property of the "Memphis and New Orleans Steam Packet Company," of which the defendant is one of the stockholders, and not liable to be attached for the individual debt of the defendant, and that, therefore, said attachment should be dissolved. He further denied that any partnership ever existed between himself and Thomas Hamilton, other than such as may result by law from the ownership (11) of the "H. R. W. Hill," and that no person had the right to bind him by note or other contract under the name of "Newell & Hamilton." Further, that the cause of action arising out of the shipment of salt was barred by the prescription of one year under art. 3,501 of the Civil Code of Louisiana.

He further sets up a settlement with the plaintiff, and terminates by a prayer for general relief.

The case was tried without the intervention of a jury; the court drew up a statement of facts, which has the effect of a special verdict, (Cuarler & Emerling, 22 How, 33; Burr & Des Moines Co., 1 Wall., 162,) and this court has only to consider that statement of facts and the defendant's bill of exceptions, (16.)

The judgment of the circuit court was in conformity with the prayer of the petition.

The same counsel who appeared for the plaintiff in error in the court below has filed in this court an elaborate brief, in which various objections against the correctness of the judgment are strenuously urged.

I. He first contends that the attachment should be dissolved; which would vacate the bond given to the attaching creditor. The counsel says (see Brief, p. 2) that he offered proof of the change of the ownership of the boat. Of this there is no evidence in the case whatever. And the point cannot be made in this court, because it was not made in the circuit court, as is clearly shown by the absence of any allusion to it in the statement of the court, (12,) and in the eight distinct grounds filed in support of the motion for a new trial, (15.) Newell still had some interest in the boat, by his own averment, and that certainly could be attached. The remaining interests, if belonging to other parties, are not represented in this suit.

II. The court found (13) that the note sued on was executed by Thomas Hamilton; that there was no commercial partnership between the defendant and Hamilton, and that they did not transact the business of the boat under a social name, and were not accustomed to sign notes and bills in this form.

It is submitted that under this undeniable state of facts a truly commercial partnership existed between Newell and Hamilton, under the laws of Louisiana. The law of the forum must apply, unless it be made to appear that some other system of law must govern the case, which was not done in this case. The plaintiff in error admits in his answer (11) that he and Hamilton were, in 1854 and 1855, the owners of the steamboat "H. R. W. Hill;" but denies that any partnership existed between them, "other than such as may result by law from such ownership." They were partners in the ownership and business of that steamboat, which it is admitted and proved was employed in carrying freight for hire, and that made them "commercial partners" under art. 2,796 of the Civil Code of Louisiana; which declares that "commercial partnerships are such as are formed" * * * "for carrying personal property, for hire, in ships or other vessels."

They were therefore bound jointly and severally for this debt, and the settlement of the claim by the note now sued on, by one of the partners, cannot be complained of by the other partner, particularly as the cause of action was fully proved in this case, and as he "was aware of the making of the note and the consideration for which it was given; and it is not shown that he ever dissented from the act, or ever made any objection to the claim." (Statement of the court, p. 13.) It was further shown (*ibid*) that the reason why the 2,188 sacks of salt were not delivered, was that they were in very bad condition; the owners of the boat, Newell & Hamilton, acknowledging their liability, took the salt and disposed of it on their own account, and therefore, not only as carriers, but by appropriating the property to their own use, with the evident intention of indemnifying the owner, became responsible for the value of the property. The transaction was such that it becomes superfluous to prove that the prescription of one year, under art. 3,502 of the Civil Code of Louisiana, for the mere delivery of freight, is not applicable. Nor was Hamilton's promise to pay interest for the indulgence shown—in not pressing the claim at once—an unreasonable exercise of his authority as a partner.

"The act of each partner is considered as the act of the whole partnership, or of all the partners, only so far as that act was within the scope of the business of the firm; but one copartner may bind the firm in matters out of their usual course of business, if they arose out of and were connected with their usual course of business, or if they receive the express sanction and confirmation of the firm."

1 Parsons on Contracts, 160 and 161, and cases there cited.

And this "express sanction" was not wanting, in this case, on the part of Newell. We have seen that it was proved, (13,) that the agent of the boat sold this damaged salt, *with the consent of both of the owners of the boat, and for their account;* that Newell was aware of the making of the note, and the consideration for which it was given, and never objected to Nixon's claim; and, further, that after Hamilton's death, in August, 1855, Hamilton's administrator transferred to him Hamilton's fourth interest in the boat and its benefits, in consequence of which Newell assumed to pay all the debts and liabilities of the boat. This includes, of course, the note sued on, which, on its face, expresses an obligation affecting the boat; and the evidence, says the court, is satisfactory to establish that it was given in recognition of such a liability, (14.)

By this assumption the plaintiff in error became bound for the debt, even if he had not been originally bound by the note. Article 1,884 of the Civil Code of Louisiana is in these words: "A person may also, in his own name, make some advantage to a third person the condition or consideration of a commutative contract or onerous donation; and if such third person consents to avail himself of this advantage, stipulated in his favor, the contract cannot be revoked." Under this law, it was held in Louisiana, that "when the purchasers of a steamboat assume any liability for damages that may have resulted from collision with another boat, the owners of the latter may avail themselves of the assumption, and recover from the purchasers damages for the injuries sustained." (2 Hennen's Digest, 1087, No. 16, and cases there cited.)

III. In the next place, the counsel contend that the defendant in error did not prove the ownership of the salt. This was, however, first acknowledged by the settlement of Hamilton with Nixon, treating him as the party in interest. It is true that the supplemental petition, (11,) alleges that the salt was shipped by the plaintiff below, and consigned to

Wm. H. Gordon, of Nashville. The witness, Gordon, no doubt the assignee himself, testified (see Statement of court, p. 13) that he received and sold 2,310 bags per account of Nixon, thus showing Nixon, and not Wm. H. Gordon & Co., to have been the proprietor, and that he refused to receive the remaining 2,188 sacks, on account of their bad condition.

After Hamilton's direct acknowledgment of ownership and Newell's tacit assent to the settlement, it was certainly unnecessary to produce the bill of lading.

IV. A settlement was, indeed, made in 1856, between the defendant in error, who had been the agent of the boat, and the plaintiff in error, then the captain and sole owner of the boat, under which settlement various sums of money were paid by Newell to Nixon. But the statement of the court, (p. 14,) and the bill of exceptions, (p. 17,) show that this settlement related exclusively to Nixon's agency for the boat, and that the claim now sued on was not included in the accounts rendered.

V. Lastly, the counsel contends that the allowance of eight per cent. interest on the principal of the note was erroneous, and that all the interest should be disallowed, under a statute of Louisiana, of 1844, which declares that "conventional interest shall in no case exceed eight per cent. under pain of forfeiture of the entire interest so contracted."

The note, on its face, bore ten per cent. interest from maturity. It is very possible that Hamilton, after having ascertained the liability of the boat, voluntarily offered to pay a high rate of interest, to conciliate Nixon and obtain the indulgence and delay he may have been in need of; but the petition claimed and the court allowed only eight per cent. interest, which it was permitted by the law of Louisiana to stipulate.

The plaintiff in error now maintains that this whole interest must be disallowed, on the ground of usury, under the statute. This defence must also be rejected, for the obvious reason that it is made for the first time in this court. The plea of usury is set up neither in the original nor in the supplemental answer, (9, 11;) it was not urged in the circuit court, for otherwise it would have been noticed in the Statement of the court, (12,) and it is not one of the eight distinct grounds filed with the motion for a new trial, (15.) Freeborn *vs.* Smith, 2 Wall., 176. "Every means of defence, such as payment, release, novation, which goes to the extinguishment of an obligation admitted or proved to have existed, must

be pleaded specially, and cannot be set up under the general issue." 2 Hennen's Digest, 1,207, No. 16, and cases there cited.

Upon the point that this Court will only consider those questions which were raised in the court below. The leading case is Coons *vs.* Gallagher, 15 Pet., 30, in which the Chief Justice held: "Undoubtedly such a point might have been raised and decided in the State court, upon the case presented by the record; and if it had appeared that such a question upon the construction of the act of Congress had been raised and had been decided against the plaintiff, it is very clear that the judgment could have been revised in this Court. But the record does not show that this point was raised by the plaintiff or decided by the court. It is not sufficient that the point was involved in the case, and might have been raised and might have been decided; it must appear, either in direct terms or by necessary intendment, that it was in fact brought to the notice of the court and decided by it. This is the rule settled in the case of Crowell *vs.* Randall, 10 Pet., 398, in which all of the former cases upon the subject were reviewed and considered.

It seems, therefore, obvious that there is no error in the decision of the circuit court, and that it should be affirmed.

Respectfully submitted,

LOUIS JANIN,
of Counsel for Defendant in Error.

Supreme Court of the U. S.

THOMAS H. NEWELL, PLAINTIFF IN ERROR,

VERSUS

RICHARD NIXON.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the U. S.

THOMAS H. NEWELL, PLAINTIFF IN ERROR,

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RICHARD NIXON.

BRIEF FOR PLAINTIFF IN ERROR.

THIS suit was commenced by attachment, in the Fifth District Court of New Orleans, by Richard Nixon, a citizen of Louisiana, against Thomas H. Newell, a citizen of Tennessee. The steamboat "H. R. W. Hill" was seized by the sheriff under the writ; and was released on defendant giving bond according to the law of Louisiana: and, upon the petition of defendant, the cause was removed into the U. S. Circuit Court.

The suit was brought upon a promissory note, which is as follows:

"$2,587 $\frac{85}{100}$ NEW ORLEANS, 11 JANUARY, 1855.

"One day after date, the steamer 'H. R. W. Hill'
" and owners promises to pay to the order of Richard
" Nixon, twenty-five hundred and eighty-seven $\frac{85}{100}$ dolls.,
" value rec'd, with interest on same, at the rate of ten
" *per cent. per annum*, until paid.

(Signed) NEWELL & HAMILTON, Owners."

" a bond is no waiver of a party's right to show that " the facts on which an attachment has been obtained " are unfounded, or that the property attached does not " belong to the defendant."

Where an attachment is levied and there is also personal process served, or a voluntary appearance, the court is seized of jurisdiction, both over the person and over the property, and renders a personal judgment, with privilege and preference upon the property attached. The writ may be dissolved for various causes; but the jurisdiction over the person can be no more defeated by the invalidity and setting aside of the writ, than it can be conferred by the validity and maintaining of the writ. If, in this case, the proof supported the plea to the writ, as the court found that it did, the plea should have been sustained and the writ dissolved; and the only consequence would have been that the judgment would have been simply *in personam* against the defendant, without any privilege upon the property attached, which was not his, and was not subject to the writ.

Defendant also excepted to the action on the merits, that the cause of action is not set forth in the petition with sufficient accuracy and precision. R. 10. The plaintiff virtually admitted that this exception was well taken by filing a supplemental petition, in which he charged, that in June, 1854, he shipped on board the " H. R. W. Hill," a quantity of salt, 4,716 sacks, to be transported to Nashville, Tennessee, consigned and to be delivered to W. H. Gordon & Co., at Nashville, of which a portion only was delivered, &c. Rec. 11.

The defendant, reserving the benefit of the plea and exception, answered to the ~~writs~~ merits, putting at issue all the allegations of the original and supplemental petitions. He specially denied that he was ever the member of any firm or partnership known as, or doing business under the name and style of "Newell & Hamilton." He admitted that he and Hamilton had formerly owned the "H. R. W. Hill;" but denied the authority of Hamilton to bind him by note or other similar contract. He also specially denied the shipment, consignment and breach alledged. R. 10, 11, 12.

The court found that the note was executed by Hamilton. That there was no commercial partnership between the defendant and Hamilton; that they did not transact the business of the boat under a social name; that they were not accustomed to sign notes or bills in this form, or for each other, but that each signed for himself whenever it was necessary to give securities concerning the business of the boat. Opinion of the Court, R. 13; Bill of Exceptions, R. 17.

It seems to follow as a necessary legal consequence, that Newell was not bound by the note, and, that if he was liable to plaintiff, that liabillity must rest sclely upon the original consideration, the shipment, consignment and breach set forth in the petition. That the note itself proved nothing against the defendant; and that the plaintiff was bound to prove such facts as would constitute legal responsibility on the part of defendant, the shipment, the consignment, the breach, and consequent damages, exactly as if no such note had been given.

"The bill of lading was not produced, which is rather "extraordinary in so large a shipment as that in question. "It is somewhat remarkable, too, that plaintiff nowhere alleges that he was the owner of the salt. He describes himself merely as the shipper, the consignees being W. H. Gordon & Co. Now, in the absence of proof to the contrary, the consignee would be presumed to be the owner. The legal title is in him ; and the mere shipper has no interest in the contract of affreightment, or in the delivery of the cargo.

As is shown by the bill of exceptions, p. 18, no witness stated to whom the salt was consigned, except Andrew Hamilton; and he says it was consigned to plaintiff. This is a wholly different transaction from that alleged in the petition as the consideration of the note sued on. Certainly it cannot be pretended that the alleged shipment by plaintiff, consigned to W. H. Gordon & Co., is supported by proof of a consignment to plaintiff.

It is evident from the opinion and statement of the Court below, R. 13, that the note was not obligatory upon the defendant. It was necessary, therefore, for the plaintiff to set forth the consideration. He was bound to set forth the specific contract and the breach, so that the defendant might have proper notice, and be enabled to direct the proof to the particular transaction complained of. As the defendant put at issue the consideration alleged, it was incumbent on plaintiff to have proved, not some shipment and failure to deliver the cargo, from which indebtedness or liability might be

inferred, but the specific consideration alleged; that is, a shipment by plaintiff, a consignment to Gordon & Co., and the failure to deliver the cargo thus shipped and consigned. The proof is of a consignment to plaintiff, which was not alleged, and is not the contract the breach of which, plaintiff himself says, formed the consideration of the note, and was the sole ground of defendant's alleged liability. If it was necessary, as it certainly was, to allege a specific consideration, it was equally necessary to prove it as alleged. As the proof varies from the allegation, and relates to a different shipment altogether, the consideration alleged, the contract relied upon, was not proven; and the judgment should have been in favor of defendant.

If the defendant was liable to plaintiff, it was simply as a common carrier, for the damages resulting from the breach of the specific contract alleged. The best proof of that contract would have been the bill of lading; and without in some way accounting for the failure to produce it, plaintiff ought not to have been allowed to introduce secondary and oral proof of the shipment.

Moreover, there being no allegation of ownership in the plaintiff, his quality as shipper does not give him such an interest in the property as to enable him, upon that mere allegation, to maintain an action. The consignee might sue and recover upon simply alleging and proving the consignment to him, and failure to deliver; but if the shipper sues, he must allege and prove property in himself. This court may well presume, in the absence of a contrary showing, that every important

allegation has been proven to the satisfaction of the triers, when there is a general finding in favor of plaintiff; but it will certainly not presume in favor of plaintiff, that an important fact, essential to his right to recover, which he has not alleged, was proven. On the contrary, the court must and will presume that the testimony was confined to the issues between the parties: and, in this case, as there was no allegation, that there was no proof of ownership in the plaintiff, and, consequently, no proof of injury or damage to plaintiff, even if the proof was complete of the breach of the alleged contract of affreightment.

It was proven that Hamilton died in August, 1855: that on the 1st July, 1856, plaintiff rendered to defendant an account against the steamboat "H. R. W. Hill," upon which he and defendant settled: that defendant then paid plaintiff four thousand dollars on that account, leaving a balance due plaintiff of two thousand three hundred and seven dollars and fifty-two cents: that on the 11th September, 1856, plaintiff again rendered to defendant an account against steamboat "H. R. W. Hill," for $2,307 52, balance remaining unpaid on the account rendered 1st July, 1856: that on the 10th December, 1856, defendant gave plaintiff a draft at sixty days on Dyas & Co., for 2,415 07, being for ~~account~~ amount of that balance and interest to the maturity of the draft; and that at the time of giving this draft, plaintiff gave defendant a receipt in full of account of steamboat "H. R. W. Hill." See documents annexed to Bill of Exceptions, R. 18.

It was also proven that the accounts thus rendered and settled related exclusively to plaintiff's agency for the owners of the boat; and that the claim sued on was not included in the accounts rendered, and was not mentioned at the time the settlement was made, nor at the time the several payments were made. There was no proof that the note had ever been exhibited to plaintiff, or payment demanded of him until the bringing of the suit.

As Nixon, the plaintiff, had been agent for the owners of the boat, it is to be presumed that he was aware of their mode of doing business: that he knew they had no social name; and that they were not accustomed to give notes in the form of that which he held, but that each signed for himself when it was necessary to give securities concerning the business of the boat. As he had several settlements with defendant, after Hamilton's death, received large amounts of money from defendant, and never mentioned the claim in question or demanded payment until he brought suit on it, on the 5th of March, 1857, more than two years after the giving and maturity of the note, and nearly three years after the pretended breach of the alleged contract of affreightment, it is a most reasonable conclusion that the note related to some transaction between himself and Hamilton personally, for which he did not consider Newell or the boat bound. Certainly these circumstances are calculated to cast suspicion upon the claim; and to require strict and ample proof to charge the defendant.

The defendant also plead the prescription of one year, established by Art. 3501 of the Civil Code of Louisiana. As there was no proof of demand having been made of defendant, and no pretense that he ever acknowledged his liability to plaintiff on this claim, there is nothing to take it out of the prescription; and the demand was barred.

The court below erred in allowing eight *per cent.* interest, even if the proof makes out the liability of the defendant. By Art. 2895 of the Civil Code, legal interest is fixed at five *per cent.* "The amount of conventional interest cannot exceed ten *per cent.* The same must be fixed in writing, and testimonial proof of it is not allowed in any case." 6 Ann. 376. 454

This Article was amended by the act of 1844, p. 15, which declares that "conventional interest shall in no case exceed eight *per cent.*, under pain of forfeiture of the entire interest so contracted." The act of 1855, p. 352, reënacts this statute *verbatim.*

The decisions of the Supreme Court, in accordance with the code and the statute, require written proof of an agreement to pay conventional interest. Lalande vs. Breaux, 5 Ann. 505.

One of two things: the note is obligatory upon Newell; and in that event it is void, so far as interest is concerned, because it stipulates for ten *per cent.*: or, it is not obligatory on him; and in that event there is no proof of a written agreement, or of any other agreement to pay conventional interest. Either there is no proof of an agreement to pay interest, or there is proof

of an agreement to pay usurious interest, which is prohibited by the law of Louisiana.

In Reid vs. Duncan, 1 Ann. 267, the court say, in reference to the law against usury: "The statute is "prohibitory. Whatever is done in contravention of "a prohibitory law is void, although the nullity be "not formally directed. Civil Code, Art. 12. The "agreement to pay usurious interest being in violation "of a prohibitory law, we can give it no effect whatever."

This case arose and was decided under Art. 2895 of the Civil Code, which affixed no penalty to the agreement to pay usurious interest. But the act of 1844, reënacted in the general compilation of 1855, attaches as a penalty the forfeiture of the entire interest so contracted. So utterly void is such an agreement, under this statute, that the debtor, if he has actually paid the usurious interest, may sue for and recover it within twelve months. See a full comment on this statute in Lalande vs. Breaux, 5 Ann., 506, *et seq.*

Without written proof of an agreement to pay it, conventional interest cannot be recovered. An agreement to pay ten *per cent.* cannot be maintained as a valid contract to pay eight *per cent.* If the written proof establishes an agreement prohibited by law, the court can give it no effect whatever, but must declare it void *in toto.* In Reid vs. Duncan, 1 Ann., 267, the court say: "We cannot say that we will let the con-"vention stand up to the highest limit permitted by "the law, and disregard it for so much as it exceeds "the legal limit. The convention is a whole, and the "nullity covers the whole."

There was no plea of usury in this case, for two reasons: 1st. Newell did not admit that the note was obligatory upon him, and the proof shows that it was not: consequently he could not, with truth or propriety, have plead that he had made an agreement to pay usurious interest. 2d. As the note itself, which is the only agreement touching interest, was exhibited as part of the petition, and offered in evidence, it furnishes proof of a stipulation which the law prohibits, which is declared to be void by law and which the courts must reprobate. If the note were obligatory upon Newell the case would be exactly analagous, so far as the interest is concerned, to one in which a note offered in evidence should state upon its face that it is given for money lost at faro. The proof of indebtedness disclosing an agreement which the courts cannot enforce, no special plea of illegality would be necessary.

If the propositions which I have endeavored to maintain be correct, the court will allow neither the principal nor the interest. But the fact that the question of interest was brought specially to the notice of the court below on a motion for a new trial, is deemed a sufficient apology for the minuteness of the exposition of the law of Louisiana, by which it is to be determined.

I respectfully ask that the judgment of the Circuit Court be reversed with costs.

R. & H. MARR,

For Plaintiff in Error.

NEW ORLEANS, January, 1861.